Supreme Court of the United States

OCTOBER TERM, 1902.

No. ....., Original.

EX PARTE: IN THE MATTER OF U. S. JOINS,
PETITIONER.

Reply and Brief of the Choctaw and Chickasaw Nations to the Motion for Leave to File a Petition for Writs of Prohibition and for Certiorari against the Choctaw and Chickasaw Citizenship Court.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America and to the Court:

Now come the Choctaw and Chickasaw Nations, by leave of this honorable court, and show respectfully that the motion of the petitioner, U. S. Joins, for leave to file a petition for writs of prohibition and certiorari against the Choctaw and Chickasaw citizenship court should not be granted:

1. Because it appears from the petition tendered with said motion that the Choctaw and Chickasaw citizenship court has proceeded in strict conformity to the act of Congress referred to in said petition creating said court and defining its jurisdiction.

2. Because, as appears from said petition, said legislation was enacted and said court created by Congress in the exercise of its power in administering the affairs of the Choctaw and Chickasaw Nations or tribes of Indians, and is constitutional and valid.

3. Because it appears that the proceedings complained of in said court in said cause number 1 have been ended by the final judgment of said court, and that nothing remains to be done by the court in respect thereto.

4. Because it appears by said petition that U. S. Joins, the petitioner, did not appear upon the trial of said cause and file a plea to the jurisdiction of said court, nor in any way object thereto.

5. Because said Choctaw and Chickasaw citizenship court is not a part of the established judicial system of the United States of America, over which this honorable court has jurisdiction, but that said court is a special legislative tribunal established by an act of Congress, referred to in said petition, for the purpose of overcoming the difficulties in the administration of the affairs of the Choctaw and Chickasaw Nations, or tribes of Indians, encountered by the executive department of the Government of the United States in carrying out the general policy of the Government of the United States to cause the lands of said Indians to be allotted among them in severalty and to ultimately create a State of the Union out of the area embraced within the lands of the Five Civilized Tribes, and that such action is political and executive in its nature, and not the proper subject of judicial inquiry or interference.

BRIEF AND ARGUMENT IN SUPPORT OF REPLY.

It is not contended by the petitioner that the Choctaw and Chickasaw citizenship court has exceeded its jurisdiction, but it is contended that the act creating said court is unconstitutional, and that therefore this honorable court can properly entertain a petition for a writ of prohibition to that court.

Before commencing a discussion of the general questions involved, we deem it proper to briefly call the attention of the court to the object of the creation of the Choctaw and Chickasaw citizenship court. In pursuance of its settled policy to fit the Indians for citizenship and to abolish their tribal relations, and in the case of the Five Civilized Tribes to erect a State of the Union out of the area embraced within the lands of said tribes, Congress has from time to time passed various acts and entered into various treaties and agreements with the Choctaw and Chickasaw Nations and other nations of the Five Civilized Tribes. All of this legislation, except that passed since the decision, has been reviewed and considered by this court in the case of Stephens *vs.* The Cherokee Nation, 174 U. S., 445, 483–'4–'5. In that case the court passed upon only one question, the constitutionality of the legislation which authorized the commission to the Five Civilized Tribes to exercise citizenship jurisdiction and provided for an appeal from the decision of such commission to the United States courts in the Indian Territory, and the contention that the act of July 1, 1898, in extending the remedy by appeal to the Supreme Court of the United States was invalid because retrospective and destructive of vested rights. In passing upon these questions the court said :

"The grant of a new remedy by way of review has been often sustained under particular circumstances."

(See cases there cited.)

The court then says:

"In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right."

After reviewing the various treaties and decisions of the courts, tending to show the plenary power of Congress over these Indian tribes, the court declared the entire legislation to be constitutional.

It is now regarded as well settled that in dealing with these Indian questions, the action of the Government is regarded as political and executive in its nature, and any questions that may arise are beyond the sphere of judicial cognizance. (See Thomas *vs.* Gay, 169 U. S., 264; The United States *vs.* James A. Rickert (not yet reported) and cases there cited; Lone Wolf *et al. vs.* Ethan A. Hitchcock *et al.* (not yet reported).)

In the latter case the court said:

"In view of the legislative power possessed by Congress, over treaties with the Indians, and Indian tribal property, we may not specially consider the contentions pressed upon our notice, * * * since all these matters in any event were solely within the domain of the legislative authority, and its action is conclusive upon the courts." (See also Cherokee Nation *vs.* Hitchcock (not yet reported), where it was held that full administrative power was possessed by Congress over Indian tribal property.)

We submit that these cases are conclusive as to the power of Congress to enact such legislation, and since it is not contended that the court is endeavoring to exceed its jurisdiction, if this view is sustained the motion for leave to file the petition should be denied.

We respectfully urge that the Choctaw and Chickasaw citizenship court is a special legislative tribunal, which should be considered as a part of the executive department of the Government engaged in carrying out the Indian pol-

icy of the United States, and that as such its duties should be considered political in their nature and not the proper subject of judicial inquiry. It is certain that Congress, in the exercise of its plenary power over these Indian tribes, endeavored in every way possible to shield that court from interference. Section 33 of the act of July 1, 1902, creating the court, provides:

"The judgment of the citizenship court, in any or all of the suits or proceedings so committed to its jurisdiction, shall be final."

The necessity existed, and we submit that Congress had the power to erect this tribunal, in furtherance of its duty to these Indian tribes, and to provide that its judgment should be final.

The petitioner alleges himself to be a member of the Chickasaw Nation or tribe of Indians, and is bound as a member of said tribe by the terms of the agreement creating said court.

We respectfully submit that, in this view of the case, the motion to file said petition should not be granted.

The agreement of March 21, 1902, contained in the act of July 1, 1902, provides, in section 73, that "this agreement shall be binding upon the United States and upon the Choctaw and Chickasaw Nations and all Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw tribes in the manner following * * * " This agreement was voted on by the Choctaw and Chickasaw Nations and adopted on the 25th day of September, A. D. 1902, and duly proclaimed as provided in said agreement.

If the petitioner, as he asserts in his petition, is a member of the Chickasaw Nation, he is bound by the act of the nation and cannot be heard to question the authority of the court.

In the case of The Delaware Indians *vs.* The Cherokee Nation, decided on February 2, 1903, by the Court of Claims, the court says on this point:

"By the voluntary act of the Delawares they became a part of the nation at the time the provision of the constitution was in force under which from time to time the admission of persons has been allowed, and without a formal decision of its legality, it is the opinion of the court that the complainants are estopped from questioning the binding force of the constitution."

As a further reason why said motion should not be granted, we submit that, as appears by said petition, no plea to the jurisdiction of the court was filed by petitioner, U. S. Joins, and therefore no writ of prohibition could lawfully issue upon his application. It is necessary that he should show that such a plea was tendered, and that the court refused to entertain the plea. (See High's Extraordinary Legal Remedies, 1st edition, sec. 773.)

It appears from said petition that the test case provided for in section 31 of said act of Congress was, by the citizenship court, finally decided on the 17th day of December, 1902. The law does not require the exercise of any further jurisdiction by this court as regards the power conferred by said section 31. The case decided by the court under the provisions of that section is finally ended, and a writ of prohibition could not, therefore, issue to the court in any event. (See High's Ex. Legal Rem., sec. 766; U. S. *vs.* Hoffman, 4th Wallace, 158.)

PETITIONER HAS AN ADEQUATE REMEDY AT LAW.

The writ of prohibition should not be granted as prayed for in said petition, because Congress, in the exercise of its power, has provided in the act of July 1, 1902, and by the terms of said agreement, that all persons thus deprived of a favorable judgment may, within ninety days, cause their

cases to be certified to the Choctaw and Chickasaw citizenship court, where they shall be determined, and Congress has, by the act of March 3, 1903, provided that said court shall have power to take all needful testimony and to pass upon the merits of the claims of all those persons to citizenship (*In re* Huguley Mfg. Co. *et al.*, 184 U. S., 297).

We respectfully submit, upon the whole case, that the motion for leave to file the petition should be denied.

GEORGE A. MANSFIELD,
JOHN F. MCMURRAY,
MELVEN CORNISH,
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Supreme Court of the United States

OCTOBER TERM, 1902.

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No. [illegible], Original.

EX PARTE: IN THE MATTER OF S. S. JOHNS,
PETITIONER.

Supplemental Reply and Brief of the Choctaw and Chickasaw Nations to the Motion for Leave to File a Petition for Writs of Prohibition and for Certiorari Against the Choctaw and Chickasaw Citizenship Court.

GEORGE A. MANSFIELD,
JOHN F. McMURRAY,
MELVER CORNISH,
Counsel for the Choctaw and Chickasaw Nations.

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Supplemental Reply and Brief of the Choctaw and Chickasaw Nations to the Motion for Leave to File a Petition for Writs of Prohibition and for Certiorari Against the Choctaw and Chickasaw Citizenship Court.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Now come the Choctaw and Chickasaw Nations, by leave of this honorable court, and, in addition to the reply and brief heretofore filed by them, respectfully present that the motion of the petitioner, U. S. Joins, should not be granted:

1. Because this court has no power in any case to issue a writ of prohibition to the Choctaw and Chickasaw Citizenship Court, said court not being a district court of the United States within section 688 of the Revised Statutes, and not being a court over which this court has any appellate jurisdiction.

2. Because it appears from the petition tendered with said motion that the Choctaw and Chickasaw Citizenship Court in the matter complained of proceeded in strict conformity to the act of Congress referred to in said petition creating said court and defining its jurisdiction; that said court is not a part of the established judicial system of the United States over which this honorable court has jurisdiction, but that said court is a special legislative tribunal established by an act of Congress as a part of the machinery devised by it for the purpose of overcoming the difficulties encountered by the political departments of the Government—the Executive and Congress—in carrying out the general policy of the United States to cause the lands of said Indians to be allotted among them in severalty, and ultimately to create a State of the Union out of the area embraced within the lands of the Five Civilized Tribes; that such action is political and executive in its nature and not the proper subject of judicial inquiry or interference.

3. Because the proceedings complained of in said court in said cause No. 1 have been ended by the final judgment of said court, and nothing remains to be done by the court in respect thereto.

4. Because it appears by said petition that U. S. Joins, the petitioner, did not appear upon the trial of said cause and file a plea to the jurisdiction of said court, nor in any way object thereto.

5. Because the petitioner, U. S. Joins, has an adequate remedy at law and does not show that the proceedings in said court have or will cause him any injury for which a legal remedy does not exist.

6. Because Congress has provided that all persons deprived of a favorable judgment by the decree of the Choc-

taw and Chickasaw citizenship court, rendered on the 17th day of December, 1902, under the provisions of section 31 of said treaty, may have the proceedings in said cause transferred from the United States court in which it was rendered to said citizenship court for such further proceedings as will enable that court to determine the "very right of the controversy;" that this is an adequate remedy at law of which the petitioner, U. S. Joins, has availed himself since the filing of his motion for the writ of prohibition in this court, together with practically all of the persons similarly situated, and said cases are now pending in that court for determination at the special instance and request of all of said persons.

A certificate showing that said petitioner has so invoked the jurisdiction of that court is attached hereto as Exhibit "A."

BRIEF AND ARGUMENT IN SUPPORT OF REPLY.

The contention upon which the petitioner bases his right to file his petition is that the law creating the Choctaw and Chickasaw Citizenship Court is unconstitutional and void; that Congress had no power to create this court and vest it with jurisdiction.

In considering this question, it is well to review in a general way what Congress has done in an endeavor to settle up the affairs of the Five Civilized Tribes.

This purpose will be largely accomplished by an examination of the case of Stephens *vs.* The Cherokee Nation, 174 U. S., 445. There the court reviews very fully the successive steps taken by Congress in its endeavor to administer upon the affairs of the Five Civilized Tribes up to the time of that decision. In that case the court passed upon only one question and was authorized to pass upon one only—*i. e.*, the constitutionality of the legislation.

As stated by the court in that decision, owing to the mag-

nitude of the interests involved and the unusual means required to enable the United States of America, the guardian, to discharge its duty to these wards, Congress probably desired, in view of the fact that it might have to proceed further along the same lines, to have the opinion of this court as to the constitutionality of such measures. This court held all the legislation to be constitutional.

Since that decision, in the prosecution of the work of administering upon Indian affairs in the Choctaw and Chickasaw Nations, the Executive Department of the Government encountered many difficulties, which were called to the attention of the Department and of Congress in the annual reports of the Commission to the Five Civilized Tribes and of the United States Indian inspector located in Indian Territory. One of the most serious difficulties encountered was as to the determination of citizenship and the closing of the rolls required to be made by the Commission to the Five Civilized Tribes. It was contended by the nations that that class of persons admitted to citizenship by the United States courts in the Central and Southern districts of the Indian Territory were for the most part white persons and adventurers of the worst type, and that wholesale fraud and perjury had been practiced in securing said judgments. Said nations had filed a protest with the Commission to the Five Civilized Tribes against the enrollment of all those persons commonly called "court claimants," not only stating facts which tended to show that a great wrong had been done them by the rendering of judgments purporting to admit such persons to citizenship, but alleging that said judgments were void for lack of proper service upon both of said nations and for other irregularities.

In pursuance of their attempt to prevent said persons from being enrolled, certain individual members of the tribes, endeavoring to sue for themselves and all other members of said tribes, had filed a bill in equity in the

United States court for the Southern district of the Indian Territory against one Goodall *et al.*, endeavoring to have said judgments vacated and set aside, and the defendants enjoined from exercising any rights under said pretended judgments. A similar bill in equity had also been filed in the Central district of Indian Territory against Arnold *et al.*

The number of persons so claiming citizenship under the judgments of the United States courts in the Choctaw and Chickasaw Nations was several thousand. There was no provision of law by which the Choctaw and Chickasaw Nations could bring any action for their relief ; and, even if such a law had existed, actions could not have been prosecuted in all of such cases without such an expenditure of time and money as would render such a course impossible.

The Secretary of the Interior, being authorized by law to take such a course, directed the Commission to the Five Civilized Tribes to endeavor to negotiate a supplemental treaty or agreement with the Choctaw and Chickasaw Nations. Such an agreement was made between the representatives of the United States and said tribes on the 7th day of February, 1901. In transmitting this to Congress, the Secretary of the Interior used the following language:

"Believing that the questions affecting the validity and rectitude of these judgments deserved judicial investigation and scrutiny, article 8 has been rewritten, as shown in the amended draft of the agreement, so as to provide for a fair, speedy, and final decision of these questions by judicial tribunals.

"Experience has demonstrated that the Atoka agreement, ratified by the act of June 28, 1898, is faulty and does not work with satisfaction to the Indians or to the public. There is pressing reason for supplementing it by a new and further agreement. Unless this is done, the work of the Dawes Commission, as to these two tribes, must necessarily either be suspended for the time being or be attended with a degree of uncertainty which ought not to obtain in the administration of a law affecting many public and private interests.

"I believe that the agreement of February 7, 1901, as amended at the conference here named, will fully and effectually remove the difficulties which have heretofore attended the administration and execution of the Atoka agreement, and I earnestly and respectfully recommend that such amended agreement (a copy of which is herewith transmitted) be ratified by Congress."

This agreement having been transmitted on February 23, 1901, did not reach Congress in time to receive congressional action.

And the Secretary of the Interior, to remove the difficulty spoken of in his letter, directed the Dawes Commission to negotiate another treaty along the same lines, for transmittal to the Fifty-seventh Congress at its first session. This agreement contained the provisions which, as afterward ratified by the act of Congress of July 1, 1902, created the Choctaw and Chickasaw citizenship court. The Secretary of the Interior in transmitting this agreement to Congress, in addition to what he had previously stated, said:

"The subject-matter of this agreement has been most carefully considered by this Department, and I very earnestly recommend that the agreement be ratified in its present form."

Congress has, at its present session, amended the law creating said court by, in effect, providing that it shall have power to take all necessary testimony in all cases pending before it.

We have gone thus fully into the history of this legislation that the court might be enabled to see how great was the necessity for action along these lines by Congress and how thoroughly the matter has been considered by the legislative and executive departments of the Government.

As showing how the agencies employed in the Indian Territory are considered by those most familiar with their character and operations, we desire to quote the following

from the report of the Commission to the Five Civilized Tribes in 1894:

"The yearly proceedings of the Commission to the Five Civilized Tribes, of which the following pages are a record, fully indicate the functions of the organization and the progress which is being made in their exercise. It is believed that the efforts of the commission have been rewarded with a degree of success which gives assurance of the practicability of the union of legislative, executive and judicial action in one dynamic force for the administration of public affairs such as the reconstruction of Indian Territory involves. Debilitated governments, through the art of diplomacy, were to be dethroned; communal land holdings transmuted to individual ownership; the *bona fide* members of the tribes to be identified, and all with the least possible hazard to political and property rights. Through the legislative function, agreements which are to become law for the administration of these estates are negotiated. Through the judicial, the right to participate as members of the tribes is adjudicated and contentions between members involving the right to possession of given tracts of land are determined. Through the executive, the laws governing many matters affecting the property of the Five Tribes are administered. Thus has a public undertaking of great magnitude been brought within the purview of business principles with which a scheme of divided authority is incompatible."

We regard the action of the United States in establishing this machinery for the settling of this vexed question as political in its nature, and the Choctaw and Chickasaw Citizenship Court is but a part of that machinery. It can be readily seen that to stop the performance of the labors confided to that court by Congress would necessarily suspend the work of all the other departments dealing with this question, thus practically nullifying the work sought to be accomplished by the making of these treaties and the enactment of this legislation.

THE SUPREME COURT HAS NO JURISDICTION TO ISSUE THE WRIT OF PROHIBITION TO THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT.

The Supreme Court of the United States has been empowered by Congress to issue writs of prohibition to the district courts of the United States when proceeding as courts of admiralty, but in no other case.

Ex parte Gordon, 1 Black (U. S.), 503.
Ex parte Christy, 3 Howard, U. S., 293.
Ex parte Easton, 95 U. S., 68.
Ex parte Phenix Ins. Co., 118 U. S., 610.

This court entertained an application for the writ to the district court of Alaska when proceeding as a court of admiralty in the case of *In re* Cooper, 138 U. S., 404; but, upon a final hearing, 143 U. S., 472, declined to issue the writ, upon the ground that the record showed jurisdiction in the district court of Alaska. The court, however, stated in that opinion that it might well have rested its denial of the writ "upon the well-settled principle that an application to a court to review the action of the political department of the Government * * * should be denied."

A libel of review of a decree of confiscation is of the same nature and jurisdictional character as the original case, and, although the act under which the proceedings were had provided that they should be *in rem* and "conform as nearly as may be to proceedings in admiralty or in revenue cases," it is not a case in admiralty, in which case only the Supreme Court of the United States can issue a writ of prohibition to the district court (*Ex parte* Graham, 10 Wallace, 541).

The only cases in which the Supreme Court has actually issued the writ to any court are—

United States *vs.* Peters, 3 Dall., U. S., 121, and
Ex parte Phenix Ins. Co., 118 U. S., 610,

both being admiralty cases in district courts.

In the case of *In re* Baiz, 135 U. S., 403, the writ was applied for to restrain the district court of the southern district of New York from proceeding further in a libel suit against the petitioner on the ground that he was consul general and acting minister of the Republic of Guatemala, and that the district court was therefore without jurisdiction. The question of the authority of this court to issue the writ was not discussed by the court, as the writ was refused on the ground that it appeared that the Secretary of State had declined to recognize petitioner as acting in such diplomatic capacity, which action was deemed conclusive by the court, and, not being entitled to the protection accorded a foreign minister, his petition was denied on that ground.

In *Ex parte* Gordon, 1 Black, 503, on an application for a writ of prohibition to the circuit court, after the applicant had been convicted of piracy and sentenced to be executed, the court said, approving *Ex parte* Christy, 3 Howard, 292:

"The result of this opinion is that a prohibition cannot issue from this court in cases where there is no appellate power given by law, nor any special authority to issue the writ. We concur in this opinion, and the rule applies with equal force to the case before us, as it did in the case referred to."

In *Ex parte* Warmouth, 17 Wall., U. S., 64, the court remarked that it had "no jurisdiction in this case to issue a writ of prohibition until an appeal is taken," and in Virginia, petitioner, 131 U. S., Appendix LXXXIX, the decision of the court was withheld until a certificate of division of opinion between the district and the circuit judges could be filed.

The writ was applied for to restrain the circuit court in the case of *In re* Rice, 155 U. S., 396, but the jurisdiction to issue the writ was not discussed, the denial of it being made on other grounds.

The writ cannot be issued where the court is without appellate authority or special authority to issue it.

Ex parte Gordon, *supra.*

See also Chesapeake, etc., R. Co. *vs.* White, 111 U. S., 134.

Spelling's Extraordinary Relief, vol. 2, sec. 1735.

Foster's Federal Practice, 3d edition, vol. 2, sec. 362.

The authority last cited states in brief the rule to be that except as to United States courts having maritime admiralty jurisdiction and the United States district court for Alaska, or when necessary for the exercise of its own jurisdiction, this court has no power to issue the writ of prohibition.

CHOCTAW AND CHICKASAW CITIZENSHIP COURT IS A PART OF THE EXECUTIVE MACHINERY.

We respectfully urge that the Choctaw and Chickasaw Citizenship Court is a special legislative tribunal, which should be considered as a part of the executive department of the Government engaged in carrying out the Indian policy of the United States, and that as such its duties should be considered political in their nature and not the proper subject of judicial inquiry. It is certain that Congress, in the exercise of its plenary power over these Indian tribes, endeavored in every way possible to shield that court from interference. Section 33 of the act of July 1, 1902, creating the court, provides:

"The judgment of the citizenship court, in any or all of the suits or proceedings so committed to its jurisdiction, shall be final."

The necessity existed, and we submit that Congress had the power to erect this tribunal, in furtherance of its duty to these Indian tribes, and to provide that its judgment should be final.

In the case of Cherokee Nation *vs.* Hitchcock the court cites, with approval, the case of Stephens *vs.* Cherokee Nation, 174 U. S., 445, and says:

"We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."

Both the Executive and Congress have determined this special tribunal to be necessary to do justice to these tribes, and the wisdom of their course cannot be determined here.

In the case of Lone Wolf *et al. vs.* Ethan Allen Hitchcock *et al.*, not yet reported, this court says:

"Indeed the controversy which this case presents is concluded by the decision in Cherokee Nation *vs.* Hitchcock, (— U. S., —) decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the Government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained."

See also United States *vs.* James A. Rickert (— U. S., —), not yet reported.

The three branches of the Government are independent and co-ordinate, and the courts have no authority to send the writ of prohibition to other branches than the judicial.

Grier *vs.* Taylor, 4 McCord, L. S. Car., 206.
Smith *vs.* Whitney, 116 U. S., 167.
In re Cooper, 143 U. S., 472.

It will therefore be refused where its object is to restrain the action of legislative bodies or executive officers.

Spring Valley Water Works *vs.* Bartlett, 63 Cal., 245.
And other cases cited in note 4, page 1108, Ency. Pl. and Pr., vol. 16.
High's Extr. L. Rem., 3d ed., sec. 782.

IF THIS COURT HAD JURISDICTION, THE PETITION DOES NOT DISCLOSE A PROPER CASE.

Passing over the questions of the jurisdiction of this court to issue the writ, and the fact that it is asked against the machinery of the political department of this Government, we submit that the petition does not disclose a proper case for the exercise of this extraordinary remedy.

In the case of *In re* Hugley Mfg. Co. and others, 184 U. S., 297, the court said:

"It is firmly established that where it appears that a court whose action is sought to be prohibited has clearly no jurisdiction of the case originally, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to the writ of prohibition as a matter of right.

"But where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts that are not made matters of record, the granting or refusal of the writ is discretionary."

In this case the petitioner has evidently waited to see how the court below would decide the test case under section 31,

and, the decision having been adverse, is attempting to review the action of that court in this manner. The petition alleges that U. S. Joins did not appear and plead in the case below, and therefore, we submit, his motion should be denied.

Even in a proper case the petitioner must show:

1. That the court against whom the writ is sought is about to exercise judicial or quasi-judicial power.

2. That the exercise of such power is unauthorized by law.

3. That it will result in injury for which no other adequate remedy exists.

See High's Extraordinary Legal Remedies, sec. 764*a*, 3d edition.

In the case at bar the court is not about to exercise judicial power. The test case provided for by section 31 is at an end. Nothing remains to be done, and the citizenship court has no power at this time to do anything which could annul or affect their judgment in the test case.

The exercise of its power is under a valid act of Congress, and that act, in sections 32 and 33, provides an adequate remedy at law which the petitioner, since his application to this court for the writ of prohibition, has invoked by causing the papers and proceedings in the case admitting him to membership in the Chickasaw Nation to be certified from the United States court for the Southern district of the Indian Territory to the Choctaw and Chickasaw Citizenship Court for trial under section 31 of said act.

THE LEGISLATION IS CONSTITUTIONAL.

The act creating the Choctaw and Chickasaw Citizenship Court was passed by Congress in the necessary and proper

exercise of its power in administering the affairs of these tribes. It was necessary to save them from fraud and wrong, and Congress had the power to determine what means were necessary and to provide them.

McCullough *vs.* Maryland, 4th Wheaton, 316, 404.
Stephens *vs.* Cherokee Nation, 174 U. S., 445.

In the latter case the court passed upon only one question, the constitutionality of the legislation which authorized the Commission to the Five Civilized Tribes to exercise citizenship jurisdiction, and provided for an appeal from the decision of such commission to the United States courts in the Indian Territory, and the contention that the act of July 1, 1898, in extending the remedy by appeal to the Supreme Court of the United States was invalid because retrospective and destructive of vested rights. In passing upon these questions the court said:

"The grant of a new remedy by way of review has been often sustained under particular circumstances."

The court then says:

"In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right."

After reviewing the various treaties and decisions of the courts, tending to show the plenary power of Congress over these Indian tribes, the court declared the entire legislation to be constitutional.

It is now regarded as well settled that in dealing with these Indian questions the action of the Government is regarded as political and executive in its nature, and any questions that may arise are beyond the sphere of judicial cognizance. (See Thomas *vs.* Gay, 169 U. S., 264; The United

States *vs.* James A. Rickert (not yet reported) and cases there cited; Lone Wolf *et al. vs.* Ethan A. Hitchcock *et al.* (not yet reported).)

In the latter case the court said:

"In view of the legislative power possessed by Congress, over treaties with the Indians, and Indian tribal property, we may not specially consider the contentions pressed upon our notice, * * * since all these matters in any event were solely within the domain of the legislative authority, and its action is conclusive upon the courts." (See also Cherokee Nation *vs.* Hitchcock (not yet reported), where it was held that full administrative power was possessed by Congress over Indian tribal property.)

We submit that these cases are conclusive as to the power of Congress to enact such legislation, and since it is not contended that the court is endeavoring to exceed its jurisdiction, if this view is sustained the motion for leave to file the petition should be denied.

THE PETITIONER IS ESTOPPED FROM QUESTIONING THE VALIDITY OF THE ACT.

The petitioner alleges himself to be a member of the Chickasaw Nation or Tribe of Indians and is bound as a member of said tribe by the terms of the agreement creating said court.

We respectfully submit that in this view of the case the motion to file said petition should not be granted.

The agreement of March 21, 1902, contained in the act of July 1, 1902, provides, in section 73, that "this agreement shall be binding upon the United States and upon the Choctaw and Chickasaw Nations and all Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw tribes in the manner following * * *." This

agreement was voted on by the Choctaw and Chickasaw Nations, and adopted on the 25th day of September, A. D. 1902, and duly proclaimed, as provided in said agreement.

If petitioner, as he asserts in his petition, is a member of the Chickasaw Nation, he is bound by the act of the nation and cannot be heard to question the authority of the court.

In the case of The Delaware Indians *vs.* The Cherokee Nation, decided on February 2, 1903, by the Court of Claims, the court says on this point:

"By the voluntary act of the Delawares they became a part of the nation at the time the provision of the constitution was in force under which from time to time the admission of persons has been allowed, and without a formal decision of its legality, it is the opinion of the court that the complainants are estopped from questioning the binding force of the constitution."

The petitioner, U. S. Joins, has now pending before the Choctaw and Chickasaw Citizenship Court his case as a claimant to Chickasaw citizenship and enrollment, the same having been transferred on his petition to that court for trial under the provisions of section 31 of the act of July 1, 1902, since he filed his motion in this court. Having voluntarily invoked the jurisdiction of that court, he is estopped from questioning its authority, and certainly could not invoke this extraordinary remedy of prohibition against it under such circumstances.

6. THE WRIT WILL NOT BE USED TO UNDO THAT WHICH IS DONE.

As appears from said petition, the test case provided for in section 31 of said act of Congress was, by the Citizenship Court, finally decided on the 17th day of December, 1902. The law does not require the exercise of any further jurisdiction by this court as regards the power conferred by said

section 31. The case decided by the court, under the provisions of that section, is finally ended and a writ of prohibition could not therefore issue to the court in any event. (See High's Ex. Legal Rem., sec. 766; U. S. *vs.* Hoffman, 4 Wallace, 158.)

State *vs.* Stockbourne, 14 S. C., 417.

Brooke *vs.* Warren, 5 Utah, 89.

7. THE PETITIONER MUST HAVE OBJECTED TO THE JURISDICTION OF THAT COURT IN VAIN.

As a further reason why said motion should not be granted, we submit that, as appears by said petition, no plea to the jurisdiction of the court was filed by petitioner, U. S. Joins, and therefore no writ of prohibition could lawfully issue upon his application. It is necessary that he should show that such a plea was tendered and that the court refused to entertain the plea. (See High's Extraordinary Legal Remedies, 3d ed., sec. 765.)

We do not consider it necessary to discuss the question attempted to be raised by petitioner as to the suit already pending in the United States court for the Southern district of the Indian Territory. That suit is entirely different from the one authorized to be brought under section 31. The parties are different and it is different in many other important particulars; but, even if they were exactly similar, the pendency of that action could not affect the power of Congress to execute the trust reposed in it by providing necessary and appropriate legislation to protect the property of these tribes, and the result of the establishment of the Choctaw and Chickasaw Citizenship Court and the filing of the test case there would be to abate the actions already brought. This view of the law was, in fact, taken, we presume, by the court of appeals for the Indian Territory, in which the case

of Dukes *et al. vs.* Goodall *et al.* was pending, as the court declined to hand down an opinion after the passage of the act of July 1, 1902.

We respectfully submit that the motion for leave to file the petition should be denied.

GEORGE A. MANSFIELD,
JOHN F. McMURRAY,
MELVEN CORNISH,
Counsel for the Choctaw and Chickasaw Nations.

"EXHIBIT A."

SOUTH MCALESTER, *M'ch* 19, 1903.

TO MANSFIELD, MCMURRAY & CORNISH,
Att'ys Choctaw and Chickasaw Nations,
Shoreham Hotel, Washington, D. C.:

Petition for transfer of case of U. S. Joins *et al. v.* Chickasaw Nation from United States court, Southern district, Indian Territory, was filed in the Choctaw and Chickasaw Citizenship Court on March 17, 1903, and the case has been duly docketed, and writ of error has issued. Cruce and Cruce, of Ardmore, Indian Territory, are attorneys of record.

J. B. CASSADA,
Clerk Choctaw and Chickasaw Citizenship Court.